

June 11, 2024

The Honorable Virginia Foxx
Chair, U.S. House Committee on Education and the Workforce
2176 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Bobby Scott
Ranking Member, U.S. House Committee on Education and the Workforce
2176 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairwoman Foxx and Ranking Member Scott,

On behalf of the undersigned organizations dedicated to the protection of civil rights in the workplace, we write to underscore the importance of the National Labor Relations Board, the Equal Employment Opportunity Commission, and the laws each agency is tasked with enforcing. Our nation's labor laws and equal employment opportunity (EEO) laws, along with effective and fair-minded enforcement by these agencies, collectively form a critical framework that protects workers from exploitation, harassment, and discrimination and enables them to act collectively and bargain to prevent those workplace harms. Both our labor laws and our EEO laws are essential to creating and maintaining economic security for workers, and we reject attempts to undermine that framework by pitting labor and EEO protections against each other.

Unions, the labor laws that undergird and protect worker organizing, and the work of the NLRB to enforce those laws are essential elements of promoting equity in the workplace. Women in unions are paid higher wages and experience smaller wage gaps than nonunionized women.¹ Unions reduce racial and ethnic pay gaps, and racial wealth gaps are much smaller for union members. And in the absence of laws that protect workers from arbitrary and unjust termination, workers gain access to just cause job protection through their union contracts, providing a critical avenue to protect workers from discriminatory and retaliatory firings. A nationwide survey found that Black and Hispanic workers at all educational levels experience racial inequities in at-will firings.² Unions also increase wages, narrow the pay gap, and help secure accommodations for workers with disabilities.³ Older workers are the largest share of unionized workers in the United States,⁴ and analysis shows that union representation at work paves the path to financial security for older Americans.⁵ And LGBTQ workers in unions are better

¹ Adrienne DerVartanian and Sarah Javaid, "Unions Are Good for Women," *National Women's Law Center*, April 23, 2024, <https://nwlc.org/resource/unions-are-good-for-women-2>.

² Josh Bivens, Celine McNicholas, Kyle K. Moore, and Margaret Poydock, "Unions promote racial equity," *Economic Policy Institute*, July 31, 2023, <https://www.epi.org/publication/unions-promote-racial-equity>.

³ Aurelia Glass, "How Labor Unions Help Reduce the Pay Gap for Disabled Workers," *Center for American Progress*, December 6, 2023, <https://www.americanprogress.org/article/how-labor-unions-help-reduce-the-pay-gap-for-disabled-workers>.

⁴ Kenneth Terrell, "5 Facts About Unions and Older Workers," *AARP*, October 12, 2023, <https://www.aarp.org/work/careers/older-workers-unions-facts>.

⁵ Christopher D. Cook and Teresa Ghilarducci, "How Unions Pave the Path to Elder Security," *American Society on Aging*, July 20, 2022, <https://generations.asaging.org/how-unions-pave-path-elder-security>.

protected due to their union contracts.⁶ Increasing worker power through organizing and collective bargaining is core to our shared efforts to advance equal opportunity in the workplace, and the NLRB protects those goals for those in unions and those seeking to act collectively with co-workers.

At the same time, many employers work relentlessly to oppose worker organizing by those who seek to join or form a union.⁷ Too often, this opposition crosses the line into unfair labor practices, and necessitates the intervention of the NLRB. Indeed, the Economic Policy Institute found that employers are charged with violating federal law in 41.5% of all union election campaigns – and in nearly 20% of all elections were charged with illegally firing workers.⁸ In this context, where employers regularly seek out pretextual reasons to terminate employees engaged in concerted activity, we are concerned about the possibility that EEO laws could be weaponized by employers as part of a broader union-busting effort.

In recent months, we have observed with concern the public conversation about the NLRB’s 2023 *Lion Elastomers* decision, and other cases with similar fact patterns and issues at stake.⁹ In that case, the Board returned to long-established “setting-specific” standards applicable to cases where employees are disciplined or discharged for misconduct that occurs during activity otherwise protected by the NLRA – reinstating the Board’s *Atlantic Steel* and *Clear Pine Mouldings* tests.¹⁰ Some employer associations have asserted that the decision created tension and inconsistency between labor law and EEO law and exposed employers to legal liability by forcing them to, for example, either violate the NLRA or abandon their obligation to address workplace harassment.¹¹ We are skeptical of these claims. The precedent that the Board returned to had been in place for four decades before being overturned in the 2020 *General Motors* case. In doing so, the *General Motors* Board imposed the *Wright Line* standard, which requires that employees who have been retaliated against prove that an employer had a motive to discourage them from exercising their rights. This put an unfair burden of proof on workers in an environment where it is already difficult for them to enforce their rights.¹² And given the broader context of employer hostility to worker organizing and frequent wrongful termination of workers engaged in protected activity, a legal interpretation that creates an overly broad permission structure for employers to do so is ripe for misuse in ways that do not advance equal employment opportunity.

In its recently reissued harassment guidance, the EEOC stated that the commission consults with the NLRB’s Office of the General Counsel as needed when alleged harassment takes place in the context of

⁶ Sophia L. Ángeles, Lucero Herrera, Sid Jordan, Janna Shaddock- Hernández, and Saba Waheed, “Union Values and LGBTQ+ Worker Experiences: A Survey of UFCW Workers in the United States and Canada,” *UCLA Labor Center*, October 2020, <https://labor.ucla.edu/publications/lgbtqworkers>.

⁷ Celine McNicholas, Margaret Poydock, Samantha Sanders, and Ben Zipperer, “Employers spend more than \$400 million per year on ‘union-avoidance’ consultants to bolster their union-busting efforts,” *Economic Policy Institute*, March 29, 2023, <https://www.epi.org/publication/union-avoidance>.

⁸ Celine McNicholas, Margaret Poydock, Julia Wolfe, Ben Zipperer, Gordon Lafer, and Lola Loustaunau, “Unlawful: U.S. employers are charged with violating federal law in 41.5% of all union election campaigns,” *Economic Policy Institute*, <https://www.epi.org/publication/unlawful-employer-opposition-to-union-election-campaigns>.

⁹ Nick Niedzwiadek, “Employers wield EEOC concerns against NLRB,” *POLITICO*, February 12, 2024, <https://www.politico.com/newsletters/weekly-shift/2024/02/12/employers-wield-eeoc-concerns-against-nlr-00140909>.

¹⁰ “Board Returns to Traditional Standards for Evaluating Employee Misconduct During Protected Concerted Activity,” *National Labor Relations Board*, May 1, 2023, <https://www.nlr.gov/news-outreach/news-story/board-returns-to-traditional-standards-for-evaluating-employee-misconduct>.

¹¹ Letter to members of the U.S. Senate Committee on Health, Education, Labor, and Pensions and House Educational and Workforce Committee, *Coalition for a Democratic Workforce*, February 6, 2024, <https://myprivateballot.com/wp-content/uploads/2024/02/Amazon-Bryson-Case-Letter-Feb-2023.pdf>.

¹² Nicholas Stonecypher, “The NLRB’s misguided General Motors decision and so-called civility at work,” *Joel Dillard & Associates*, September 7, 2020, <https://www.joeldillard.com/organizing-with-good-manners.shtml>.

activity protected by the NLRA.¹³ Broadly, we believe that this kind of fact- and context-specific approach that balances the requirements of labor and EEO law is the best practice and appropriate for these types of cases. If more clarity is necessary, we would welcome additional guidance from the agencies.

Addressing workplace harassment is a core priority for our organizations, and so too is ensuring that workers have access to robust protection for concerted activity. Each of these are core elements of a fair and just workplace. We must not allow civil rights laws to be turned into a blank check for employers to engage in unfair labor practices. Such an outcome would not advance the cause of equity and equal opportunity in the workplace.

Thank you for the opportunity to share our views.

Sincerely,

National Employment Law Project
American Association of People with Disabilities
Association of People Supporting Employment First
Economic Policy Institute
The Leadership Conference on Civil and Human Rights
NAACP
National Employment Lawyers Association
National Institute for Workers' Rights
National Organization for Women
National Partnership for Women & Families
National Women's Law Center
Pride at Work
The Worker's Circle

¹³ U.S. Equal Employment Opportunity Commission, "Enforcement Guidance on Harassment in the Workplace," April 29, 2024, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace>.